Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS.

No. 83-558

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IRVING INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

HENRI AND MARY TATRO, INDIVIDUALLY AND AS NEXT FRIEND OF AMBER TATRO, A MINOR,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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JOINT APPENDIX

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Petition For Certiorari Filed October 3, 1983
Certiorari Granted December 5, 1983

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RELEVANT DOCKET ENTRIES
United States District Court for the Northern District of Texas, Dallas Division
Cause No. CA3-79-1281G

10/12/79	Complaint and Application for Preliminary Injunction.
11/2/79	Original *Answer* of Irving ISD and the Board of Trustees for the Irving ISD.
11/6/79	Plaintiff's Motion for Leave to File Amended Complaint to Add Defendants.
11/8/79	Amended Complaint and Application for Preliminary Injunction.
11/28/79	Defendants State of Texas and Texas Education Agency's et al., Answer to Plaintiffs' Amended Complaint.
12/7/79	Defendants Roger Hill, Dr. Robert Pierce, Mrs. Anne Pfaff, Barbara Cardwell, Troy Kelley, Mrs. Pat Norman, and John Stipes' Original Answer.
12/21/79	Memorandum Opinion. . . Defendant Townley's motion to dismiss as to him is granted and Plaintiffs' motion for a preliminary injunction is DENIED.
1/11/80	Notice of Appeal by Plaintiffs.
10/28/80	Certified copy of order from the Fifth Circuit, issued as and for the mandate vacating judgment of the District Court and same is hereby vacated; and this cause is hereby remanded to said District Court in accordance with its opinion.
10/29/80	Opinion of the Fifth Circuit.
12/16/80	Defendant Townley's Original *Answer*.
12/17/80	Amended Answer of Irving ISD, the Board of Trustees for the Irving ISD, Roger Hill, Dr. Robert Pierce, Mrs. Anne Pfaff, Barbara Cardwell, Troy Kelley, Mrs. Pat Norman, and John Stipes.

12/19/80	State Defendant's First Amended Answer.
12/31/80	Memorandum Opinion. . . the State defendants' motion to dismiss as to them is granted insofar as it pertains to retrospective relief; defendants' motions to dismiss for lack of subject matter jurisdiction, for failure to properly plead federal financial assistance, for failure to state any cause of action. . . and for failure to join indispensable parties are denied; disposition of state defendants' motion to dismiss entirely as to them, and the disposition of defendants' motions to dismiss for failure to state a cause of action for damages. . . are deferred.
1/5/81	Pre-Trial Order.
1/5/81	Order Consolidating Preliminary Injunction Hearing with Trial on the Merits.
1/16/81	Interim Order. . . Irving ISD will promptly provide Amber Tatro an individual education program that includes any Clean Intermittent Catheterization necessary to its achievement.
2/6/81	Order. . . the Court invites the Texas Medical Association, or through its component association, the Dallas County Medical Society, to submit within 30 days an amicus curiae brief. . . Copies of this order with the copies of the pre-trial order and previous opinions will be forwarded to the. . . Texas Medical Association and Dallas County Medical Association.
2/25/81	Plaintiff's Motion for Sanctions.
3/3/81	Response of Irving ISD to Motion for Sanctions.
3/13/81	Memorandum of Authorities in Support of Defendants' Supplemental Response to Motion for Sanctions, Request for Immediate Hearing and Defendants' Motion for Affirmative Relief.
3/12/81	Supplemental Response of Irving ISD to Motion for Sanctions and Request for Immediate Hearing.

3/12/81	Memorandum of Authorities in Support of Response of Irving ISD to Plaintiffs' Motion for Sanctions.
3/13/81	Affidavit of Cindy Guy.
3/27/81	Amicus Curiae Addressing Questions Raised in Order.
3/31/81	Motion of Local Defendants for Leave to File Application for Declaratory Judgment.
5/26/81	Memorandum Opinion . . . State Commissioner of Education, State of Texas, and Texas Education Agency are Dismissed. Members of Board of Trustees are Dismissed in their individual capacities. School district is ordered to modify Amber's IEP to provide for CIC as prescribed by her personal physician. Plaintiffs are entitled to damages, not including attorneys' fees, of $1,271 . . . this court finds reasonable attorneys' fees to be $24,192. In addition, plaintiffs will be awarded reasonable attorneys' expenses of $3,039.
5/26/81	Judgment . . . Ordered that the State Board of Education and Irving ISD modify the Individual Education Program of Amber Tatro to include the provision of Clean Intermittment Catheterization . . . Ordered that plaintiffs recover of the Irving ISD their damages and reasonable attorneys' fees and expenses in the sum of $28,502, plus interest at the rate of 9% per annum from this date until paid. Court costs are taxed against defendants.
6/5/81	Irving ISD, defendant's, Motion for Amendment of Findings of Fact to Include Additional Findings and Alter Previous Findings—To Amend Conclusions of Law to Make Additional Conclusions of Law and Alter Previous Conclusions—and for Amendment of Judgment.

9/8/81	Memorandum Opinion.
9/8/81	Amended Judgment . . . Ordered that the State Board of Education and the Irving ISD modify the Individual Education Program of Amber Tatro to include the provision of Clean Intermittent Catheterization . . . as prescribed by a valid medical prescription provided by Amber Tatro. Also Ordered that plaintiffs recover of Irving ISD their damages of $1,271, and of the Irving ISD and State Board of Education, jointly and severally their reasonable attorneys' fees and expenses of $27,231, plus interest from 5/26/81 until paid at the rate of 9% per annum. Court costs are taxed against defendants.
9/17/81	Notice of Appeal by Irving ISD.
9/18/81	Motion for Stay.
9/25/81	Order on motion for stay by Irving ISD . . . Court stays enforcement of the award of compensatory damages and attorneys' fees, effective as of the date of filing of the supersedeas bond in the sum of $30,000 in a form approved by the court. The court does not stay the injunctive relief requiring the provision of Clean Intermittent Catheterization.
9/25/81	Notice of Appeal by State Defendants.
10/26/81	Transcript of Proceedings held 3/13/81.
10/26/81	Transcript of Proceedings held 4/23/81.
10/26/81	Transcript of Proceedings held 1/5-6/81, Vol. I.
10/26/81	Transcript of Proceedings held 1/5-6/81, Vol. II., with Exhibits.
1/14/82	Supersedeas Bond.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION
CA3-79-1281-G

HENRI and MARY TATRO, *et al*

Plaintiffs

v.

THE STATE OF TEXAS, *et al*

Defendants.

FILED
Jan. 5, 1981
JOSEPH McELROY, JR.,
CLERK
By ? ? ? ? ?
Deputy

PRE-TRIAL ORDER

On the 5th day of January, 1981, came on the parties in the above styled and numbered cause through their respective attorneys of record and agreed to the entry of the following Pre-Trial Order:

1. CONTENTIONS OF THE PARTIES.

a. Summary Of Plaintiffs' Contentions.

Plaintiffs, Henri and Mary Tatro, as next friend of Amber Tatro, contend that the provision of Clean Intermittent Catheterization (C.I.C.) is required to be included in the Individual Education Program (IEP) of Amber pursuant to 20 U.S.C. § 1400 et seq, The Education of All Handicapped Children Act (EACHA), and the regulations promulgated thereunder, in order that the Defendants meet the requirements

under the EACHA regarding the provision of a free appropriate public education. Plaintiffs further contend that they are entitled to injunctive and monetary relief pursuant to 20 U.S.C. § 1415.

Plaintiffs also contend that the provision of C.I.C. is required to be provided Amber under 29 U.S.C. § 794 and the regulations promulgated thereunder. Plaintiffs seek injunctive and monetary relief under 29 U.S.C. § 794.

Plaintiffs further contend that Amber's procedural due process rights under the Fourteenth Amendment have been violated and that they are entitled to monetary relief pursuant to 42 U.S.C. § 1983.

Plaintiffs also seek recovery of attorney's fees under all the above mentioned claims for relief.

Specifically, Plaintiffs contend that C.I.C. is required as a related service under 45 C.F.R. 121a.13, and that Amber is being denied access to a free appropriate public education under 29 U.S.C. § 794.

b. Summary Of Defendants' Contentions.

The Irving Independent School District, The Board of Trustees for the Irving Independent School District, the State of Texas, the Texas Education Agency, and the Texas State Board of Education contend as follows:

> That the Complaint fails to invoke the jurisdiction of the Court pursuant to 29 U.S.C. § 794: that the Complaint fails to state a claim for which relief may be granted pursuant to 29 U.S.C. § 794; that no private cause of action exists in favor of Plaintiffs pursuant to 29 U.S.C. § 794; that 29 U.S.C. § 794 does not create additional financial obligations to recipients of federal funds; that 29 U.S.C. § 794 does not create affirmative action obligations upon State or local recipients of federal funds; that 29 U.S.C. § 794 does not create a private right of action for monetary damages; that the regulations promulgated by

H.E.W. pursuant to 29 U.S.C § 794 exceed the delegated authority which prohibits relief thereunder.

That the Complaint fails to invoke the jurisdiction of the Court pursuant to 20 U.S.C § 1400 et seq.; the Complaint fails to state a claim for which relief may be granted pursuant to 20 U.S.C. § 1400 et seq; that 20 U.S.C. § 1415 does not create a private right of action for monetary damages; that joinder of the Office of Special Education is necessary to complete relief under 20 U.S.C. § 1400 et seq.

That the Complaint fails to state a claim for which relief can be granted under 42 U.S.C. § 1983.

Specifically, Defendants contend that Plaintiff was afforded free appropriate public education as required by 20 U.S.C. § 1400 et seq; 29 U.S.C. § 794, and the regulations promulgated thereunder. That C.I.C. is medical treatment of a diseased state designed to meet individual health needs; that C.I.C. is not required in order that Amber may attend school; that Plaintiff's alleged neurogenic bladder condition is not an educational handicapping condition; that the IEP developed by the Irving Independent School District meets the requirements of the state educational agency and provides a free appropriate public education; that requiring Defendants to provide C.I.C. will impose an undue burden on Defendants; that none of Plaintiff's civil rights or rights guaranteed by the Fourteenth Amendment were infringed; that Plaintiffs have failed to mitigate their damages, if any; that all actions of the Defendants were done in good faith in their official capacity.

The individual members of the Board of Trustees for the Irving Independent School District, the individual members of the Texas State Board of Education, Alton Bowen, and J. F. Townley assert the same contentions as the above-mentioned Defendants and further contend that they all acted in their official capacities and in good faith with regard to Plaintiffs' claims and that they are, therefore, immune from monetary damages.

All Defendants further contend that C.I.C. is medical treatment under state law.

The State of Texas, the Commissioner of Education, the State Board of Education, and all the members thereof further contend that any claim against them is barred by the Eleventh Amendment to the United States Constitution and the doctrines of judicial and legislative immunity.

2. STIPULATED FACTS.

a. Amber was assessed by Irving Independent School District's Admissions, Review and Dismissal Committee to be Orthopedically Handicapped and recommended placement for the school year 1979 in its Early Childhood Development Classes.

b. The parties did not recognize the neurogenic bladder condition as an educational handicapping condition; no specific alternative placement other than the Early Childhood Development Classes were offered nor requested.

c. The IEP does not include any provision for Irving Independent School District providing personnel to perform or furnish clean intermittent catheterization during the school day.

d. Amber Tatro is a four year old female child presented to the Irving Independent School District for education assessment and placement with, among other physical problems, a medically diagnosed neurogenic bladder secondary to myelodysplasia, commonly called "spina bifida," a history of hydrocephalus (excessive water pressure on or in the brain tissue), and a history of myelomeningocele (herniation of the spinal cord and/or nerves).

e. Amber's bladder dysfunction is a direct and proximate result of her "neurogenic bladder," which involves an inability to retain urine with resulting symptoms of constant dribbling or intermittent involuntary emptying of the urinary bladder, and an inability to properly empty the bladder, producing excessive pressure within the bladder and, subsequently, into the uretera and kidney-collecting systems. The medical hazard to Amber is the

back pressure effect, or reflux action, in the bladder and the recurring infection of the urinary tract and/or the kidneys.

f. Clean Intermittent Catheterization (C.I.C.) is a procedure which was introduced in 1972 by Lapides in cases such as Amber's as a means of controlling infection and deteriorating function where the patient is unable to use the bladder sphincter nerves to voluntarily empty bladder contents. Urinary infection and functional deterioration of the kidney can be treated, controlled, or prevented in many cases by this modality. The procedure involves the catheterization of the subject on a regular time sequence to duplicate as closely as possible the normal voiding cycle. C.I.C. is one of several accepted medical treatment modalities which has been successful in the control and management of urinary retention and incontinence for many children.

g. In females, the preparation, materials, and procedure for performing C.I.C. is generally as follows:

1. Equipment and Materials:

(a) Clean catheter in size prescribed by treating physician;

(b) Catheter carrying containers;

(c) Catheter extension when patient is in a wheelchair;

(d) Clear plastic liquid detergent container with a hanger when patient is in a wheelchair;

(e) Soap and water;

(f) Container for catching the urine;

(g) Table or desk on which to place the child;

(h) Large underpad to prevent soaking of liners or other table covering; and

(i) Water soluable lubricant.

(2) Preparation and Procedure:

(a) Get all the equipment and materials ready.

(b) Wash hands with soap and water.

(c) Get the child ready and place her on her back on the table or desk (C.I.C. is easier to perform at table or desk height).

(d) Spread labia apart with one hand and wash genitalia with soap and water with the other hand, always moving in a downward direction (never working in an upward direction since doing so will move germs from around the rectum up into the area of the bladder opening).

(e) Hold the catheter one inch from the tip and insert it into the urethra until the urine flows.

(f) Hold the catheter in place until the urine stops draining, then push the catheter in another inch or so to be sure the bladder is completely emptied.

(g) Remove the catheter slowly, stopping any time urine flows so as to empty the bladder completely. When the Catheter is ready to come out, hold the catheter tip up so that the urine will drain down from the tip of the catheter and not on you.

(h) After noting and recording the amount of urine obtained, its appearance and any abnormality, discard the urine.

(i) Clean the catheter with soap and water, allow it to dry and place it in a clean, dry envelope. At least once a day after the catheter has been washed with soap and water, place it in a pot of water and boil for 20 minutes. Allow it to air dry and place it in a clean dry envelope.

(j) Catherize at prescribed intervals so that there is never more than 5 ounces (150cc) of urine in the bladder at any one time for a female child of one to five years of age.

(k) Keep a daily record of the time of catheterization, the amount of urine obtained, and if the child is wet, damp or dry.

(l) Do not crede the bladder as it may push urine back into the kidneys.

h. Prior to the development of use of C.I.C., urinary diversion, artificial sphincter inplantation, and/or other methods were used in the management of children with overflow incontinence as the treatment of choice.

The introduction of C.I.C., the artificial urinary sphincter, urodynamics, temporary vesicostemies, neuropharmacology, and rhizotomy have radically altered the management of the urinary tract in children with myelodysplasia.

i. The procedure of C.I.C. is currently considered by most medical centers to be the treatment of choice for the neurogenic bladder condition.

j. Parents can be taught catheterizaton. It takes 30 minutes one day, and that is all they are taught. Amber has been catheterized at home by her parents, teenage sibling, and babysitter, and at Helping Hand Center by her teacher, teacher aide, and the occupational therapist. Teachers have been taught catheterization procedures.

k. With normal intelligence, most children are able to self-catheterize from approximately six to seven years of age, sometimes even earlier.

l. Amber must be catheterized approximately four times per day to avoid a substantial risk to her health.

m. Quite a few children have graduated from Defendant School District without the benefit of catheterization, upon whom conduits were performed which was by far and away the best treatment for them.

n. Intermittent catheterization is probably just a stopgap until better surgical techniques are developed.

o. Number of times catheterization is required per day depends on the bladder capacity and fluid intake and/or retention.

p. Irving Independent School District and The State of Texas and The Texas Education Agency, herein Defendants, receive some federal funds.

q. Possible complications of catheterization, clean or sterile, include septicemia, irritation of the urethra, and bleeding.

r. The Irving Independent School District has never denied Amber enrollment in its Early Childhood Development Classes.

s. Plaintiffs did not seek to enroll Amber in the Defendant School District for the 1980-81 school year.

t. Dr. George Hurt is Amber's physician. He is not employed by the Defendants nor is he a party to any contractual agreement with such Defendants. Dr. Richard Bates is medical consultant to the Defendant School District.

u. Prescribing C.I.C. or other treatment of a neurogenic bladder is the sole responsibility of the treating physician and is a medical function.

v. When a physician delegates a medical function to a nurse or other nonphysician, he must exercise supervision and control. (Texas Board of Medical Examiners' Rule 386.01.13001).

w. An assessment of an individual which identifies a disease as the source of abnormal symptoms constitutes medical diagnosis and is a medical function.

x. C.I.C. is medical treatment.

3. CONTESTED ISSUES OF FACT.

a. Whether Amber can receive and benefit from the educational services prescribed in Irving Independent School District's IEP without C.I.C. being provided by Irving Independent School District.

b. Whether C.I.C. must be administered during school hours;

c. Whether a neurogenic bladder is a handicapping condition which qualifies or requires special education and related services under federal and state laws and regulations;

d. Whether requiring Defendants to provide C.I.C. would constitute an undue burden on Defendants;

e. Whether Plaintiffs are entitled to damages;

f. Whether the State of Texas receives federal financial assistance under 20 U.S.C. § 1400 et seq. in the area of Early Childhood Education;

g. Whether the Texas Education Agency receives federal financial assistance under 20 U.S.C. § 1400 et seq., for Early Childhood Education;

h. Whether the Irving Independent School District receives federal financial assistance under 20 U.S.C. § 1400 et seq., for its Early Childhood Development Program;

i. Whether the State of Texas receives federal financial assistance through the department of H.E.W. (now Health and Human Services) for Early Childhood Education programs pursuant to The Rehabilitation Act of 1973;

j. Whether the Texas Education Agency receives federal financial assistance through H.E.W. for Early Childhood Education programs pursuant to The Rehabilitation Act of 1973;

k. Whether the Irving Independent School District receives federal financial assistance through H.E.W. for its Early Childhood Development program pursuant to The Rehabilitation Act of 1973;

l. Whether the individual Defendants acted in good faith with regard to the actions taken giving rise to this suit;

m. Whether the current Scottish Rite educational evaluation is proper and meets the standards required by PL 94-142 and/or state procedures.

n. Plaintiffs have refused Irving Independent School District's request to complete a current educational education-assessment of Amber.

o. Plaintiffs have refused Irving Independent School District's request for authorization to obtain Scottish Rite Hospital's education, medical, or hospital records.

p. Plaintiffs have not requested any educational services be provided Amber for or during the 1980-81 school year.

4. CONTESTED ISSUES OF LAW.

a. Whether a private cause of action exists pursuant to 29 U.S.C. § 794;

b. Whether 29 U.S.C. § 794 creates additional financial obligations to recipients of federal funds;

c. Whether 29 U.S.C. § 794 creates affirmative actions obligations upon state or local recipients of federal funds;

d. Whether the specific program involved must be shown to receive federal funds pursuant to 29 U.S.C. § 794.

e. Whether 29 U.S.C. § 794 creates a private cause of action for damages;

f. Whether the regulations promulgated by H.E.W. pursuant to 29 U.S.C. § 794 exceed the authority of H.E.W. in that they impose additional financial obligations and affirmative action obligations which prohibit any relief pursuant thereto;

g. Whether the regulations promulgated by the Office of Education pursuant to 20 U.S.C. § 1400 et seq. exceed the authority of H.E.W. in that they impose additional and/or different obligations not created by Congress in enacting 20 U.S.C. § 1400 et seq.

h. Whether 20 U.S.C. § 1400 et seq. creates a private right of action for damages;

i. Whether the joinder of Bureau for Education and Training of Handicapped (B.E.H.), now Office of Special Education, must be joined as a party hereto pursuant to Rule 19 FRCP.

j. Whether the Irving Independent School District is authorized under state law to provide and furnish medical treatment, deliver health care services, and specifically assume the responsibility of furnishing C.I.C.

k. Whether C.I.C. is a developmental, corrective, supportive, or evaluative service not instructional in nature that is required for Amber to benefit from the instructional program and to fulfill the requirements of the student's individual educational plan.

5. PENDING MOTIONS.

a. The State Defendants have a Motion for Leave to File an Amended Answer;

b. Motion to Dismiss of the State Defendants;

c. The local Defendants have a Motion for Leave to file an Amended Answer;

d. Motion to Dismiss of all Defendants; and

e. Motion to Dismiss of Defendant Townley.

6. EXHIBITS, WITNESSES AND DEPOSITIONS.

a. *Plaintiff's Witnesses and Exhibits:*

(1) Witnesses:

(a) Mary Tatro

(b) Gordon Williamson*

(c) John Townley

(d) George Hurt*

(e) T. Richard Handler*

*It is possible that due to a scheduling conflict, another witness may need to be substituted; the Court will be advised at the earliest time.

(2) Exhibits:

(a) Transcript and exhibits from the Impartial Due Process Hearing, June 19, 1979.

b. *Defendant Irving Independent School District's Witnesses and Exhibits:*

(1) Witnesses:

(a) Dr. Richard Bates, M.D.

(b) Robert J. Pierce

(c) John F. Townley

(d) Lois DeAndrea

(e) Cindy Guy

(f) Brooks Teague

(g) Clifton McNeely

(h) Betty Howe

(i) Rosemarie Klassen

(j) Dr. Elgin Ware

(k) Dr. John Shilling

(l) Dr. Stephen Bell

(m) Dr. George Hunt

(n) Blanche Carpenter

(o) Dawn Morrell.

(2) Exhibits:

(a) Transcript and exhibits from the Impartial Due Process Hearing, June 19, 1979; record of Commissioner of Education; record of State Board of Education

(b) Texas Education Agency Rule 226.34.13.010 concerning school health services program

(c) Texas Education Rule 226.35.73.022 concerning school health services and the Special Education Program

(d) "Clean Intermittent Catheterization Program," Position Paper; *Wisconsin Department of Public Instruction, Division for Handicapped Children, and Bureau for Crippled Children*

(e) Written orders and/or instructions of Dr. George Hurt for C.I.C. and medication or other orders in the care and treatment of Amber Tatro

(f) Student test records, evaluation summaries, student referrals, ARD Committee summaries, medical and hospital records of Amber Tatro in Irving Independent School District's eligibility folder pertaining to Amber Tatro

(g) Medical, hospital and educational records concerning Amber Tatro of Scottish Rite Crippled Children Hospital

(h) Texas Education Memorandum of October 22, 1980, entitled "*Classifications of Policies and Administrative Procedures for the Education of Handicapped Students*," ADO 871 01, 35.74.060, Provision of Services for Students Placed by Their Parents in Private Schools

(i) Irving Independent School District's *Job Description for School Nurses*

(j) Educational, medical and catheterization records of Special World Day Care Center concerning Amber Tatro

(k) Educational, medical and catheterization records of Helping Hand School concerning Amber Tatro

(l) Logs and records maintained by Plaintiffs reflecting dates, times, urine volume obtained and its condition of catheterization of Amber Tatro

(m) Irving Independent School District policy on administering medication

7. ESTIMATED LENGTH OF TRIAL.

The estimated length of trial is three (3) days.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM,
United States District Judge

APPROVED:

/s/ Martha H. Allan
MARTHA H. ALLAN
Attorney for The State of Texas
and State Defendants

/s/ Craig T. Enoch
CRAIG T. ENOCH,
Attorney for Plaintiffs

/s/ James W. Deatherage
JAMES W. DEATHERAGE,
Attorney for Irving Independent
School District and Local
Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO.
CA-3-79-1281-G

HENRI and MARY TATRO, *et al.*,

Plaintiffs

v.

STATE OF TEXAS, *et al.*,

Defendants

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUN 5 1981
JOSEPH McELROY, JR., CLERK
By _____
Deputy

MOTION FOR AMENDMENT OF FINDINGS OF FACT TO INCLUDE ADDITIONAL FINDINGS AND ALTER PREVIOUS FINDINGS—TO AMEND CONCLUSIONS OF LAW TO MAKE ADDITIONAL CONCLUSIONS OF LAW AND ALTER PREVIOUS CONCLUSIONS—AND FOR AMENDMENT OF JUDGMENT

Irving Independent School District, one of the Defendants herein, requests the Court pursuant to Rules 52 and 59 F.R.C.P. to amend its previous findings of fact to include additional findings, to alter previous findings, to amend its previous conclusions of law, to make additional conclusions, to alter previous conclusions and to amend the Judgment of the Court, said findings and conclusions being contained in the Judgment and Memorandum rendered by the Honorable Pat-

rick E. Higginbotham, District Judge, on May 26, 1981, in this action:

REQUESTED ADDITIONAL FINDINGS OF FACT

Irving Independent School District requests the Court to make the following additional findings of fact:

1. Defendants, the State of Texas, the Texas Education Agency, and the State Board of Education are responsible for administering federal funds received pursuant to Title VI-Part B, Education of All Handicapped Children Act of 1975 (EACHA), 20 U.S.C. § 1401 *et seq.*, in the State of Texas.

2. Amber Tatro became eligible for Special Education Services through Irving Independent School District's Early Childhood Development Program for handicapped children in August, 1979, because of an orthopedic handicap which adversely affected her educational performance.

3. Amber is medically diagnosed to suffer from a "neurogenic bladder" which involves an inability to retain urine with resulting symptoms of intermittent, involuntary dribbling of urine from the bladder, and inability to completely empty the bladder, which produces excessive pressure within the bladder and, subsequently, into the ureter and kidney collecting systems. The medical hazard to Amber is the back pressure effect, or reflux action, in the bladder and the risk of infection to the urinary tract and/or the kidneys.

4. Possible complications of catheterization, clean or sterile, include septicemia, irritation of the urethra, and bleeding.

5. Because of Amber's orthopedic handicap, the Irving Independent School District's Admission, Review and Dismissal (ARD) Committee developed an individual education program for Amber which included specially designed instruction to meet the unique needs of her education handicapping condition, and related services necessary for her to benefit from the instruction specially designed for her, and recommended the program be carried out and im-

plemented in an Early Childhood Development class conducted from 8:30 o'clock a.m. to 11:15 o'clock a.m., each day.

6. The State Board of Education, after administrative proceedings, by order dated September 8, 1979, found as follows:

   (1) "Based upon the evidence and foregoing findings of fact, we conclude that CIC is medical treatment of a disease state.

   (2) Based upon the evidence and foregoing findings of fact, we conclude that the IEP developed by the District's ARD Committee meets the standards of the State Educational Agency and provides the child in question a Free Appropriate Public Education within the intent and meaning of applicable statutes and regulations."

7. The State of Texas and the Texas Education Agency adopted a plan pursuant to EACHA which plan was approved by the Commissioner of Education.

8. Irving Independent School District complied with the State Plan and the order of the State Board of Education.

9. Plaintiffs did not attack the State Plan as not providing for a free appropriate education pursuant to EACHA.

10. Plaintiffs did not provide Irving Independent School District with a sufficient parental consent for medical treatment until after the March 13, 1981, hearing on Plaintiff's Motion for Sanctions.

11. Plaintiffs did not provide Irving Independent School District with a valid medical prescription authorizing the requested CIC until after the March 13, 1981, hearing on Plaintiff's Motion for Sanctions.

12. Irving Independent School District never refused to provide occupational therapy and physical therapy which it would have been required to provide upon request (see Defendant's EXHIBIT NO. 9) and Amber's failure to receive same resulted from her parents' refusal to enroll her or to request such services at home, in nursery school,

Helping Hand Development Center or elsewhere. (See also 34 C.F.R. 121a.347 and 121a.348)

13. Without a valid medical prescription, school personnel would have been in violation of the Texas Medical Practices Act by performing CIC.

14. Requiring the Irving Independent School District to provide CIC would require substantial adjustments in its existing programs.

15. Requesting the Irving Independent School District to provide CIC would impose upon the district additional financial and administrative obligations.

16. Requiring the Irving Independent School District and its employees to provide CIC would impose additional obligations upon the district due to the uncertainty of existing state law with regard to liability for carrying out delegated medical tasks.

17. Requiring the Irving Independent School District to provide CIC would require the district to secure the services of persons sufficiently trained to allow a treating physician to prescribe with a view toward prescription implementation by the school.

18. Plaintiffs did not show that the Irving Independent School District receives funds for its Early Childhood Education for handicapped students program nor for its school health services.

19. The regulations promulgated by the Texas Education Agency pursuant to legislative authority define the term "qualified school nurse."

20. A school nurse can perform only those tasks authorized by the Central Education Agency of the State of Texas.

21. CIC should be provided only under the orders or direction (valid medical prescription) of a licensed physician. In addition to determining if and when CIC is appropriate treatment, the following services of the licensed supervising physician are required:

    (A) The physician continues to monitor the progress of the patient.

(B) He must determine if the treatment is being properly performed and is progressing without complication.

(C) He must determine the extent of supervision or control which is proper from time to time.

(D) He must determine the needs and capabilities of the patient.

(E) He must determine the training, experience, and competence of the person who will be performing his prescribed procedure.

(F) He must assume the responsibility for supervision, training, and control of the unlicensed person performing the procedure.

(G) Physician supervision is vital to minimize the likelihood and severity of complications and to insure proper maintenance and sterilization of the equipment used.

(H) He must be sure the person performing the procedure is trained to perform it properly and is taught to recognize conditions which should be brought to his attention.

(I) When delegating performance of the procedure, he must ensure that his instructions are sufficient to match the individual's training and tailor his instructions to a pre-established level of the training of that person.

(J) He must be available at all times to the person he delegates the performance of the procedure for advice and consultation.

(K) He must have the right of control over the person to whom he delegates the performance of the procedure.

(L) A physician's prescription is required for obtaining the appropriate catheter as it is a "prescription device" under FDA regulations.

22. Amber's physician, Dr. George Hurt, testified that he would not be responsible or accept responsibility for the actions of school personnel in performing CIC.

23. Irving Independent School District did not solely by reason of her handicap subject Amber to discrimination under any program or activity of the district which received federal financial assistance. (No valid medical prescription was provided.)

24. Irving Independent School District did not solely by reason of her handicap exclude Amber from any program or activity of the district which received federal financial assistance.

25. Irving Independent School District did not solely by reason of her handicap deny Amber the benefits of any program or activity of the district which received federal financial assistance.

REQUESTED ALTERED AND AMENDED FINDINGS OF FACT

1. CIC is not a "school health service" under Texas Law or the Texas Regulations pursuant to T.E.A. Policy 35.73.023.(1)(c)(iii)(XIII) *Policies and Administrative Procedures For the Education of Handicapped Students* which policies were approved as the State Plan and which control pursuant to this Court's decision.

2. Amber does not require CIC between the hours of 8:30 a.m. and 11:15 a.m. in order that she may benefit from special education (Plaintiffs did not prove by a preponderance of the evidence that CIC was necessary during school hours as required by the opinion of the Fifth Circuit Court of Appeals).

3. Dr. Hurt nor any other qualified physician testified that failure to provide CIC between the hours of 8:30 a.m. and 11:15 a.m. would in a reasonable medical probability create a substantial risk to Amber's health.

4. The majority of Plaintiffs' attorneys' time was spent in administrative hearings and appeals pursuant to EACHA and not in an attempt to enforce 29 USC § 794 (§ 504) which enforcement is not within the jurisdiction of the Texas Education Agency or the State Board of Education.

5. The relief obtained by Plaintiffs was not through the efforts of Plaintiffs' attorneys.

6. Any violation of the EACHA by the Irving Independent School District was as a result of compliance with the orders of the State Board of Education and the compliance with the State Plan which had been approved by the Commissioner of Education pursuant to the EACHA.

REQUESTED AMENDED AND ADDITIONAL CONCLUSIONS OF LAW

1. Irving Independent School District is not liable in damages or attorneys' fees for compliance with the order of the State Board of Education and compliance with the approved state-wide plan. (Alternatively, if the Court does not withdraw its decision, damages and attorneys' fees should be taxed against the State Board of Education.)

2. No relief can be granted without the State of Texas and Texas Education Agency whose plan Irving Independent School District implemented.

3. There being no attack upon the State Plan with which Irving Independent School District complied, there was no violation shown and no relief is available without the State of Texas and Texas Education Agency. (See Plaintiffs' Memorandum in Support of Plaintiffs' Cause of Action Against State Defendants, pp. 3,4.) There being no attack upon the State Plan or relief requested, as a result of said plan violating EACHA, there can be no recovery against the Irving Independent School District.

4. CIC is medical treatment no matter by whom or in whose presence it may be performed.

5. CIC is not a "school health service" and thus a "related service" under State Law because such interpretation would require medical services for purposes other than for diagnostic and evaluation purposes.

6. CIC is not a school health service and thus a related service under the EACHA because such interpreta-

tion would require medical services for purposes other than for diagnostic and evaluation purposes. (The stipulation that CIC is medical treatment was not before the Fifth Circuit.)

7. EACHA does not create substantive rights, only procedural rights.

8. EACHA does not create a right to medical treatment for health conditions of handicapped children.

9. Regulations implementing the EACHA and § 504 of the Rehabilitation Act stop short of Requiring medical treatment whether or not it is provided by a physician or a nurse. Where residential placement is required, medical treatment and care if specifically omitted from the services required to be provided at no cost to the parent. [(34 C.F.R. 121a.302 and 34 C.F.R. 104.33(c)(3).] Thus the regulations do not contemplate the requirement of providing medical treatment in order to benefit from special education, whether it be by a licensed physician or a qualified school nurse.

10. Regulations implementing the EACHA exceed the authority granted by the statute if interpreted so as to create a substantive right to medical treatment under the definition of "school health services" when the statute specifically limits the medical services to those for diagnostic and evaluation purposes only. Therefore, CIC is not a "related service."

11. Absent a valid medical prescription, Irving Independent School District could not administer CIC, and all retrospective relief is denied. (The parties agreed that CIC could not be provided without a valid medical prescription.)

12. There being no evidence that the Irving Independent School District Early Childhood Education Program is federally assisted, no relief can be granted pursuant to Section 504.

13. Even assuming that the evidence was sufficient to show that Irving Independent School District Early Childhood Education Program is a federally assisted program, there was no evidence that Section 504 was violated and no attorney's fees may be recovered.

14. Imposing additional administrative and financial obligations upon Irving Independent School District with regard to liability for negligence of school district employees performing services in conformity with a valid medical prescription imposes an undue financial and administrative burden on the district and is thus not required by Section 504.

15. Requiring the Irving Independent School District to secure the services of persons sufficiently trained to allow a treating physician to prescribe with a view toward prescription implementation by the school would impose undue financial and administrative burdens on the district which are not required by Section 504.

16. Requiring the Irving Independent School District to make substantial adjustments in its existing programs in order to provide CIC is not required by Section 504.

17. Section 504 does not create a right to medical treatment for health conditions.

18. Section 504 does not create additional financial obligations or affirmative action obligations on recipients of federal funds.

19. Providing CIC would impose additional financial and affirmative action obligations upon Defendants and is not required by Section 504.

20. The EACHA does not create a private right or action for damages.

21. Plaintiffs are not entitled to attorneys' fees pursuant to Section 504 since no violation of such section was proved.

22. Plaintiffs are not entitled to attorneys' fees for time, preparation and expense incurred in the administrative proceedings under EACHA since attorneys' fees are not recoverable under EACHA and the administrative proceedings could not occasion relief pursuant to Section 504.

This Motion is based on the files, records, transcripts and evidence herein.

WHEREFORE, Defendant, Irving Independent School District, prays that the Court:

1. Make the additional findings of fact as requested herein;
2. Alter its previous findings of fact as requested herein;
3. Make the additional conclusions of law requested herein;
4. Alter its previous conclusions of law as requested herein; and
5. Amend the judgment and deny Plaintiffs all relief requested; or alternatively
6. Amend the judgment to allow recovery of $1,271.00 against the State Board of Education and no recovery of attorneys' fees; or alternatively
7. Amend the judgment to provide recovery of $1,271.00 plus attorneys' fees in relation to the Section 504 claim only, such judgment being against the State Board of Education; or alternatively
8. Amend the judgment to provide recovery of $1,271.00 plus attorneys' fees against the State Board of Education as opposed to the Irving Independent School District.

Respectfully submitted,

DEATHERAGE & WEAVER

By James W. Deatherage
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By O. Glenn Weaver
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NOTICE OF MOTION

TO: Mr. Craig Enoch, Moseley, Jones, Enoch & Martin, Attorneys at Law, 6060 North Central Expressway, Suite 850, Dallas, Texas 75206 and

Ms. Martha Allen, Assistant Attorney General, Supreme Court Building, Austin, Texas 78711

Please take notice that on _____, 1981, at _____ o'clock ___.m. or as soon thereafter as counsel can be heard, in Room ____ United States Courthouse, 1100 Commerce, Dallas, Texas, the undersigned will bring the above motion on for hearing.

DATED this ____ day of _____, 1981.

DEATHERAGE & WEAVER

By James W. Deatherage
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SBC# 05701000
201 Southwest Bank Building
Irving, Texas 75061
(214) 254-3188

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion for Amendment of Findings of Fact to Include Additional Findings and Alter Previous Findings—To Amend Conclusions of Law, To Make Additional Conclusions of Law and Alter Previous Conclusions—and for Amendment of Judgment and Notice of Hearing was mailed by

certified mail, return receipt requested, with postage thereon paid in full, on this ____ day of June, 1981, to:

Mr. Craig T. Enoch
Moseley, Jones, Enoch & Martin
Attorneys at Law
6060 North Central Expressway; Suite 850
Dallas, Texas 75206

and

Ms. Martha Allen
Assistant Attorney General
Supreme Court Building
Austin, Texas 78711

James W. Deatherage
JAMES W. DEATHERAGE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1454

IRVING INDEPENDENT SCHOOL DISTRICT, *et al*
Appellants-Defendants,

v.

HENRI and MARY TATRO, Individually,
and as Next Friend
of AMBER TATRO, a Minor,
Appellees-Plaintiffs.

From The United States District Court
For The Northern District Of Texas
Dallas Division

PETITION FOR REHEARING OF IRVING INDEPENDENT SCHOOL DISTRICT, APPELLANT

JAMES W. DEATHERAGE
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Attorneys for Appellant,
Irving Independent School District

May 9, 1983

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1454

IRVING INDEPENDENT SCHOOL DISTRICT, *et al*
Appellants-Defendants,

v.

HENRI and MARY TATRO, Individually, and as Next Friend of AMBER TATRO, a Minor,
Appellees-Plaintiffs.

PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Pursuant to the provisions of Rule 40 of the Federal Rules of Appellant Procedure, IRVING INDEPENDENT SCHOOL DISTRICT, Appellant, respectfully petitions the Court to grant a rehearing and reconsideration of the appeal in the above-entitled cause. In support of this petition, Appellant represents to the Court as follows:

1. It is the Appellant's opinion the Panel has misapprehended the binding effect and authoritative nature of *Tatro I* in applying the "law of the case" principles to the subject appeal and has overlooked the fact *Tatro I* was in the nature of an advisory opinion "based upon a hypothetical state of facts." (See *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 229 (1937).

Tatro I involved an appeal from a denial of a preliminary injunction in which the Panel held the District Court did not make specific findings of fact, or at least insufficient findings. The Fifth Circuit has consistently refused to review cases of

such nature because of incomplete and inconclusive records. *Davis* v. *United States*, 422 F.2d 1139 (5th Cir. 1970). As the Panel in *Davis* said at p.1141,

> "In the words of the Supreme Court, a full and fair compliance with Rule 52(a) is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction." Citing *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940).

The fact that *Tatro I* assumed the facts and a subsequent Panel feels bound by it, illustrates the reasoning behind the rule. Requiring public school districts to secure the services of persons sufficiently trained to allow a physician to prescribe his preferred medical treatment is of such public importance that the Panel should reconsider its holding that *Tatro I* is not clearly erroneous and does not work manifest injustice on the Texas public schools.

2. In holding that *Tatro I*, 625 F.2d 557 (1980), is the authoritative interpretation of The Education of All Handicapped Children Act ("EAHCA"), 20 U.S.C. § 1401(17)(1976), the Panel has overlooked substantial evidence which is substantially different from the facts assumed in *Tatro I*. Specifically, the Panel has overlooked the various services of a licensed physician which are required for the physician's delegatee to perform the delegated medical task, and which services are not for evaluation or diagnostic purposes.

The necessary services required of a licensed physician, none of which were addressed in *Tatro I*, include the following:

> (a) The physician must prescribe the medical treatment to be delivered. If the Appellant's employees provided the medical treatment involved in this case without a valid doctor's prescription, they would violate the Texas Medical Practice Act, *Tex. Rev. Civ. Stat. Ann.*, Art. 4495 et seq. (Vernon 1976), codified in Texas' new Medical Practice Act, *Tex. Rev. Civ. Stat. Ann.*, Art. 4495b et seq. (Vernon Supp. 1982-1983). See Pre-trial Order (App.82); the joint brief of the Texas Medical Association and the Dallas County Medical Society as amicus curiae reprinted as an appendix to the District Court's opinion on remand,

516 F.Supp. at 987; and the findings of the District Court to this effect (App.44).

(b) When delegating prescribed medical treatment, the physician must

(1) determine the needs and capabilities of the patient;

(2) determine the training, experience, and competence of the person who will be performing the prescribed treatment;

(3) assume the responsibility for supervision, training, and control of the unlicensed person performing the procedure;

(4) determine if the treatment is being properly performed and is progressing without complication;

(5) monitor the patient's progress and perform the numerous physician duties discussed in amicus brief of Texas Medical Association reprinted as an appendix to the District Court's opinion on remand, 516 F.Supp. at 987.

Thus it is clear extensive services of a licensed physician are required to administer the prescribed medical treatment. Therefore, the medical treatment prescribed is not a "related service" as defined at 20 U.S.C. § 1401(17), 45 C.F.R. § 121a.13(a), nor is it a required "Medical Service" as defined at 45 C.F.R. § 121a.13(b)(4). Since the public school employee cannot administer the prescribed medical treatment without a valid physician's prescription and other services of a licensed physician, the public school employee is not a "qualified person" as contemplated in the definition of "school health services" at 45 C.F.R.
121a.13(b)(10).

(c) The Panel further overlooked or misapprehended the Appellant's position concerning the physical presence of the physician in its opinion at p.4010.

This has never been the Appellant's position. It has been the Appellant's position throughout these proceedings the physician could not lawfully prescribe medical

treatment and delegate its administration to the public school unless he adequately supervised, controlled, and assumed the responsibility for the person performing the delegated medical tasks; and the public school could not, therefore, lawfully provide the medical treatment (at least in the absence of adequate prescription, delegation, supervision, and assumption of responsibility, without running afoul of The Texas Medical Practice Act and Texas Education Agency's Policies and Procedures governing school health services). See the Panel's quote of *Tex. Rev. Civ. Stat. Ann.*, Art. 4495b § 3.07(i) (Vernon Supp. 1982-1983) at the beginning of p.4011 of its opinion.

The District Court was vitally concerned regarding the extent of the physician's control and supervision. It, therefore, requested an amicus brief from Texas Medical Association in which it requested the Amicus address the nature and extent of supervision and control.

If the delegatee acts with knowledge that the delegation and action thereunder is a violation of the Medical Practice Act, the delegatee may be guilty of practicing medicine without a license (p.4011 of the Panel's opinion). It is therefore the Appellant's opinion the EAHCA nor § 504 of the Rehabilitation Act mandates and requires the public school assume such risk nor be required to interpret and construe such Act in developing an appropriate IEP for a handicapped child. *Tatro I* did not address these issues, and the Appellant believes the Panel should reconsider its decision in light thereof.

3. The Panel also overlooks the evidence offered by the Appellee's physician, Dr. Hurt, who prescribed the treatment in question. Dr. Hurt testified he did not supervise or control any of the Appellant's employees (Tr.253, 276), that he did not direct any of its employees (Tr.276), and that he would not assume the responsibility for supervision and control over any school employee (Tr.253, 276). These facts were also not among the assumed facts in *Tatro I*, and substantially differ from those it assumed.

Having overlooked these facts and their importance, it is the Appellant's opinion the Panel misapprehended Texas law concerning delegation of medical tasks when applied to these

facts. In this regard, the Panel is referred to its cited authorities on pps.4010 and 4011 of its opinion requiring the delegating physician to supervise and assume control of the employee and to remain responsible for the medical acts of the person performing the delegated medical acts, all of which Dr. Hurt refused to do.

4. In holding that the prescribed medical treatment is a "related service," the Panel overlooks an important part of the *Tatro I* opinion which it held to be the "law of the case."

The *Tatro I* Panel held at 625 F.2d at 562-63:

> Excluded from the term "related services" are those *health-related activities which must be performed by a licensed physician* that are not provided "to determine a child's medically-related handicapping condition which results in the child's need for special education and related services." (Emphasis added.)

Since neither the public school nor its employees can lawfully provide and furnish the prescribed medical treatment without the services of a licensed physician, hereinabove enumerated, the prescribed medical treatment is excluded from the term "related services" by the holding in *Tatro I*.

5. In discussing the role of the Individualized Education Program ("IEP") at pps.4012-4014 of its opinion, it is Appellant's belief the Panel has overlooked and misapprehended the meaning and required content of the IEP as construed and applied by the U.S. Supreme Court in *Board of Education* v. *Rowley*, ___ U.S. ___, ___, 102 S.Ct. 3034, 3048 (1982) and as provided at 45 C.F.R. 121a.346. The required content of the IEP does not include the setting or "placement" in which the IEP is to be implemented. The Panel overlooks the fact the Early Childhood Development class ("ECD") is only a "placement" and not a part of the IEP.

If, in selecting the least restrictive environment for "placement," there is found any potential harmful effect on the child, the placement is obviously not appropriate, 45 C.F.R. § 121a.552(d). The District Court found a potential risk and

hazard to the Appellee if placed in ECD without the medical treatment. As we have subsequently learned through *Rowley* at 3051 and 3045, fn 21, the Court should not have modified the IEP but remanded the case back to the school district to consider an alternative setting and suitable environment in which the IEP could safely be implemented. The Panel should, therefore, reconsider its decision as to the authoritative nature of *Tatro I* as "law of the case" in view of *Rowley*.

6. In affirming the decision of the District Court, the Panel has overlooked the definition of "free appropriate public education" ("FAPE"), which includes special education and related services which meet the standards of the State educational agency. 20 U.S.C. § 1401(18), as discussed and applied in *Rowley*, at 3041-3049. *Tatro I* did not address these standards and cannot be considered as "law of the case"; particularly in view of *Rowley*, *supra*. Further, the District Court nor the Panel has made any finding or holding that the FAPE offered or provided did not meet the standards of the State educational agency. Perhaps it is so because the Appellee has never asserted the special education and related services failed to meet such standards.

7. In holding that the Appellants violated § 504 of the Rehabilitation Act of 1973, the Panel, in awarding attorney fees pursuant to 29 U.S.C. § 794a(b), overlooks and misapprehends the asserted violation is solely a result of interpreting a provision of the EAHCA. The Panel and the District Court have both held the Appellant was entitled to require a detailed prescription and instructions tailored to the particular needs of each individual child before it is required to provide the prescribed medical treatment. The Panel discusses the required contents of the prescription and instructions at p.4012 of its opinion and in fn 5.

The District Court found the Appellant could not provide the medical treatment requested without a valid medical prescription (App.44), and that a valid prescription and consent were never furnished the Appellant until after April 23, 1981,

following trial on the merits (App.53, 54). Therefore, the Panel should reconsider its decision in view of these findings and determine when these Appellants violated any requirements of § 504. Since this issue nor these facts were before the Court in *Tatro I*, that Panel's decision should not be considered as controlling of the question.

8. The Panel has overlooked the fact the Appellee was the prevailing party under EAHCA, not the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (1976). But for the advisory opinion in *Tatro I* interpreting 20 U.S.C. § 1401(17) and 45 C.F.R. 121a.13(b)(10), the Appellees would not have prevailed at all. Since EAHCA does not provide for attorney fees, the Panel should reconsider its affirmance of the District Court's decision in that regard since Appellee was not a prevailing party under the Rehabilitation Act, but under EAHCA.

On March 24, 1983, in *Thomas F. Smith, Jr., et al* v. *Cumberland School Committee*, ____ F.2d ____ (1st Cir. 1983), Doc. No. 82-1524, a sister court of appeals has refused to award attorney fees because the Plaintiffs prevailed under EAHCA and not the more general civil rights laws.

9. This appeal involves fundamental issues of exceptional importance to the public and affects the operation of the entire public school system of Appellant. The decision of this court on this appeal will have a vital effect on such school system and on other public school systems throughout the 5th Circuit, if not the nation. It is, therefore, appropriate that the Panel reconsider its decision and withdraw its opinion.

WHEREFORE, the Irving Independent School District, Appellant, requests that a rehearing of the appeal in the above-entitled cuase be granted; the Panel's opinion dated April 25, 1983, be withdrawn; and the Court enter a new opinion revers-

ing the judgment of the District Court or, in the alternative, vacate and remand for further proceedings.

Respectfully submitted,

/s/ James W. Deatherage
JAMES W. DEATHERAGE
200-201 InterFirst Bank Building
Irving, Texas 75061
(214) 254-3188

Attorneys for Irving Independent School District, Appellant

CERTIFICATE

As counsel for the Irving Independent School District, Appellant, I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

/s/ James W. Deatherage
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200-201 InterFirst Bank Building
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(214) 254-3188

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Rehearing of Appellant, Irving Independent School District, has been delivered by Certified Mail, Return Receipt Requested, to Mr. James C. Todd, Advocacy, Incorporated, 5555 North Lamar, Suite K-109, Austin, Texas, 78751; to Ms. Martha H. Allan, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas, 78711; and to Mr. Tally F. Parker, Jr., 300 InterFirst Bank Building, Irving, Texas, 75061, on this the 9th day of May, 1983.

/s/ James W. Deatherage
JAMES W. DEATHERAGE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1454

IRVING INDEPENDENT SCHOOL DISTRICT, *et al*
Appellants-Defendants,

v.

HENRI and MARY TATRO, Individually,
and as Next Friend
of AMBER TATRO, a Minor,
Appellees-Plaintiffs.

From The United States District Court
For The Northern District Of Texas
Dallas Division

SUGGESTION OF EN BANC CONSIDERATION ON REHEARING OF IRVING INDEPENDENT SCHOOL DISTRICT, APPELLANT

U.S. COURT OF APPEALS
RECEIVED
MAY 9 1983
NEW ORLEANS, LA.

JAMES W. DEATHERAGE
DEATHERAGE & WEAVER, INC.
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Irving, Texas 75061
Attorneys for Appellant,
Irving Independent School District

May 9, 1983

CERTIFICATE OF INTERESTED PERSONS

No. 81-1454—Tatro v. The Irving Independent School District

The undersigned counsel of record certifies that the following-listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal:

APPELLANTS:

Irving Independent School District and its Board of Trustees: Roger Hill, Robert Pierce, Anne Pfaff, Vickie Tatum, Troy Kelley, Pat Norman, John Stipes, and Dr. James W. Filbeck; John F. Townley, Superintendent of Schools, Irving Independent School District.

POSSIBLE APPELLANTS AND/OR APPELLEES:

State of Texas, Texas Education Agency, State Board of Education and its members: Elizabeth Armstrong, James M. Binion, Joe Kelly Butler, W. W. Carter, Don H. Cook, Brian Crouch, Jimmy L. Elrod, W. H. Fetter, Wayne Frederick, Joseph C. Gathe, E. R. Gregg, Jr., Rubin E. Hinojosa, Jim Hollingsworth, William N. Kemp, Mary Ann Leveridge, Paul Matthews, Rex Reddell, William R. Sarsgard, Richard Tencinte, Laura Tynes, Marjory Vickery, James H. Whiteside; Alton Bowen, Raymond Bynum, present Commissioner of Education.

APPELLEES:

Henri Tatro, Mary Tatro, and Amber Tatro, a minor.

/s/ James W. Deatherage
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200-201 Interfirst Bank Building
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(214) 254-3188
Attorneys for Appellant,
Irving Independent School District

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the Panel decision is contrary to the following decision(s) of the Supreme Court of the United States, and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

Southeastern Community College v. *Davis*, 442 U.S. 397, 99 S.Ct. 2361 (1979)

Pennhurst State School and Hospital v. *Halderman*, 451 U.S. 1, 101 S.Ct. 1531 (1981)

Board of Education v. *Rowley*, ___ U.S. ___, 102 S.Ct. 3034 (1982)

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Does the Education of All Handicapped Children Act require public schools to deliver *medical treatment* as may be ordered by a physician?

2. Does § 504 of the Rehabilitation Act of 1973 obligate public schools to take sufficient affirmative steps necessary to enable a physician to prescribe and delegate *medical treatment* for a handicapped child?

3. Is a decision of a single panel, in the nature of an advisory opinion, dispositive of these questions?

/s/ James W. Deatherage
JAMES W. DEATHERAGE
Attorney of Record for Appellant, Irving Independent School District

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42 U.S.C. § 6010	00

STATEMENT OF THE ISSUES

1. In view of *Pennhurst* and *Rowley*, what substantive obligations does The Education for All Handicapped Children Act impose on public schools to provide medical and health care for their handicapped students?

2. In view of *Southeastern Community College* v. *Davis* and *Pennhurst*, what is the extent of any affirmative obligations imposed by § 504 of the 1973 Rehabilitation Act on public schools in providing a free appropriate public education?

3. Is the decision of the Panel in *Tatro* v. *Texas*, 625 F.2d 557 (5th Cir. 1980), the law of the Fifth Circuit since the subsequent decisions of the U.S. Supreme Court in *Pennhurst* and *Rowley?*

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

This is Amber Tatro's second appearance before this Court. The facts and procedural history of this case are reported in detail in *Tatro I*, 625 F.2d 557 (1980), and in those of the District Court, 516 F.Supp. 968 (1981); 481 F.Supp. 1224 (1979). We will briefly summarize them here.

In early 1979, when Amber was 3½ years old, her mother asked the Irving Independent School District to provide special education for Amber. The School District agreed, and in a series of meetings with the Tatros, developed an Individual Education Program ("IEP") for Amber. The IEP did not provide for clean intermittent catheterization ("CIC") which, subsequent to *Tatro I*, was stipulated by the parties and found by the District Court to be *medical treatment* requiring a valid prescription of a physician and other physician's services. The School District, Appellant, maintained it had no legal obligation to provide for nor administer CIC.

Amber's parents pursued an administrative appeal through the Texas State Board of Education which agreed with the

School District's decision, holding Amber's IEP met the standards of the State educational agency and complied with applicable statutes and regulations.

The Tatros then brought the present action in Federal District Court pursuant to 20 U.S.C. § 1415(3)(2) (1976), contending that the School District violated the EAHCA and § 504 of the Rehabilitation Act of 1973 prohibiting discrimination against the handicapped in federally-funded programs.

The District Court denied the Tatros' motion for preliminary injunction to require the School District to provide CIC. 481 F.Supp. at 1229.

The Tatros then appealed from the District Court's order to the United States Court of Appeals for the Fifth Circuit (*Tatro I*). With no facts to speak of, and no findings upon which to rely for review, the Panel in *Tatro I* reversed. *Tatro I*, 625 F.2d at 558 n.1, 562. Based upon its assumed facts, *Tatro I* held that CIC was a "related service" required to assist a handicapped child to benefit from special education (citing 20 U.S.C. § 1401(17) (1976)). *Tatro I* further held that the School District's refusal to provide CIC violated § 504.

On remand, the District Court, feeling constrained by *Tatro I*, ordered the Irving Independent School District to modify Amber's IEP to include the provisions for CIC "in accordance with and as prescribed by a valid medical prescription provided by Amber." Although the District Court believed *Pennhurst* reinforced the District Court's doubts that § 504 required the provision of CIC, the Court felt sufficiently constrained by *Tatro I*, and without finding a specific violation of § 504, awarded Appellees attorneys fees pursuant to 29 U.S.C. § 794a(b). The School District perfected the present appeal to this Court.

On April 25, 1983, the Panel in the present appeal AFFIRMED the decision of the District Court, following the general rule that one panel of the court does not overrule another panel.

STATEMENT OF FACTS

Amber Tatro is a seven-year-old girl afflicted with myelomeningocele, a birth defect resulting in orthopedic impediments, some speech impairment, and a neurogenic bladder. The neurogenic bladder condition prevents voluntary emptying of the bladder. The *medical treatment* of choice chosen by Amber's doctors for *treatment* of the bladder condition was clean intermittent catheterization ("CIC") and medication which must be administered several times daily to prevent injury and infection.

When Amber was 3½ years old, her mother requested the Irving Independent School District, Appellant, to provide special education for Amber. The School District agreed and, in a series of meetings with the Tatros, developed an Individual Education Program ("IEP") for Amber pursuant to provisions of State law, State policies and procedures, and The Education of All Handicapped Children Act ("EAHCA"), 20 U.S.C. § 1401(19), 1414(a)(5) (1976). Amber qualified for special education because of her orthopedic handicap. The IEP developed for Amber included physical therapy and occupational therapy due to her orthopedic impairment which had delayed development of growth and fine motor skills, and some speech therapy.

The educational "placement" or setting recommended for Amber was in the School District's Early Childhood Development Class ("ECD"), which class was scheduled for 2 hours and 45 minutes each school day. The IEP did not include providing Amber with *medical treatment* for the neurogenic bladder.

Amber's parents, Appellees, thereafter filed a complaint with the State educational agency pursuant to the provisions of 20 U.S.C. § 1415(b)(2), because the IEP, defined at 20 U.S.C. § 1401(19), did not include provisions for treating Amber's neurogenic bladder as a "related service". The administrative proceedings of the State educational agency resulted in an order September 8, 1979, to the effect that the requested treatment of Amber's neurogenic bladder was *medical treat-*

ment of a diseased state, and that the IEP developed by the School District met the standards of the State educational agency and provided the child in question a free appropriate public education ("FAPE") within the intent and meaning of applicable statutes and regulations (Tr.p.135, P.Ex.5).

After exhausting State remedies, the Tatros brought the present action in Federal District Court pursuant to 20 U.S.C. § 1415(e)(2) (1976), contending that the School District violated the EAHCA by failing to provide Amber with a FAPE, *Id.* § 1412(1). Specifically, they argued that the requested services for Amber were a "related service" the State and local School District must provide to fulfill their duties to Amber under the School District's refusal to provide the services violated § 504 of the Rehabilitation Act of 1973 which prohibits discrimination against the handicapped in federally-funded programs. 29 U.S.C. § 794 (Supp. V 1981).

The District Court denied the Tatros' motion for a preliminary injunction to require the School District to provide the services for Amber's neurogenic bladder. 481 F.Supp. at 1229. The District Court concluded that the services were not a "related service" within the meaning of the EAHCA because they were not related to special education and the need for it "does not arise from the effort to educate". *Id.* at 1227. The District Court further concluded that the Tatros "cannot convert a statute prohibiting discrimination in certain governmental programs to a statute requiring, in essence, the setting up of governmental health care for people seeking to participate in such programs", and therefore § 504's prohibition of discrimination does not impose a duty upon the School District to take affirmative action to care for Amber's neurogenic bladder. *Id* at 1228-29.

The Tatros appealed from the District Court's order; and based upon facts the Panel assumed for purposes of reveiw, it VACATED and REMANDED. *Tatro I*, 625 F.2d at 558 n.1, 562. The Panel in *Tatro I* held the services requested fell within the literal terms of the statutory definition of "related servies",

which includes "supportive services . . . as may be required to assit a handicapped child to benefit from special education." *Id.* at 564 (citing 20 U.S.C. § 1401(17) (1976)). Because, under the Panel's assumed facts, Amber would be unable to attend the recommended educational setting or placement, ECD, without provision of the requested service during the school day, the Panel concluded that receipt of the requested services was essential if she was to benefit from special education, and that the care of her neurogenic bladder was, therefore, a "related service" in her case. This Court further held that the School District's refusal to provide the requested service, which was held to be a "related service" under EAHCA, violated Section 504 of the Rehabilitation Act. The Court remanded the case to the District Court for further proceedings not inconsistent with its opinion based upon its assumed facts.

Upon remand, the Tatros stipulated the requested service was *medical treatment*, was the *treatment* of choice of most *medical* centers, that prescribing CIC or other *treatment* of a neurogenic bladder is the sole responsibility of the *treating* physician and is a *medical* function (App. p. 15 at 21 and 22). The District Court, although finding the School District could not lawfully provide the *medical treatment* to Amber without a valid doctor's prescription and other services of a licensed physician (App.33 at pps. 44, 45), ordered the Texas State Board of Education and the Irving Independent School District to modify Amber's IEP to include the provisions for the requested *medical treatment* "in accordance with and as prescribed by a valid medical prescription provided by Amber." Without finding a violation of § 504 of the Rehabilitation Act of 1973, the District Court, believing *Tatro I* was binding unless plainly undermined by the later decided *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 101 S.Ct. 1531, and remaining unconvinced as to the applicability of § 504 reinforced by *Pennhurst*, but for reasons of institutional order, awarded Appellees attorney fees pursuant to 29 U.S.C. § 794a(b). The School District duly perfected its appeal from the District Court's decision to this Court.

This Court's Panel on the subject appeal, *Tatro II*, in its Opinion of April 25, 1983, AFFIRMED the decision of the District Court. In doing so, it wrote the following:

> Were we writing on a clean slate, we would share the district court's reluctance to read a statute designed to aid education to require provision of medical necessities of life which are required by a child whether or not she participates in the State's educational program. Nevertheless, *Tatro I* is the authoritative interpretation of the EAHCA in this circuit, and under "law or the case" principles, must be followed by us in this subsequent appeal. . . (Panel's Opinion at p.4009)
>
> Although we perhaps would have taken a different view of the EAHCA upon de novo consideration, we cannot say that the well-documented *Tatro I* decision was not also a principled interpretation of that undeniably Delphic statute. (Panel Opinion at p.4009)

At p.4015 of the Panel's Opinion, it, in addressing the § 504 claim and attorney fees, said:

> Although *Pennhurst* reinforced the district court's doubts that § 504 requires provision of CIC, the court concluded that the Supreme Court had not spoken with sufficient clarity to allow it to depart from prior decisions of this court squarely on point. 516 F.Supp. at 985. As a single panel of the court, we find ourselves similarly constrained. *Tatro I*, binding upon us to the extent that it is law of the case, clearly held that CIC is within § 504's nondiscrimination mandate.

The Panel, following "the general rule that one panel of our court does not overrule another panel", did not think *Pennhurst* went so far so as to enahle the Panel to take a view different than, or contraty to, the Panel in *Tatro I*.

ARGUMENT

In *Board of Education* v. *Rowley*, *supra*, the United States Supreme Court held a public school was not required to provide a deaf student an interpreter in the classroom in order that she receive a FAPE as provided for by EAHCA. The EAHCA requirement of a FAPE is satisfied under *Rowley* when the

State provides personalized instruction with sufficient support services to permit the handicapped child to benefit *educationally* from that instruction.

The Supreme Court in *Rowley* further defined what is meant by a FAPE under the EAHCA. "Such instruction and services must be provided at public expense, must meet the state's educational standards, must approximate the grade levels used in the state's regular education, and must comport with the child's IEP." *Id.* 102 S.Ct. at 3049.

Rowley also answered the question of the role the courts play in suits brought under the EAHCA. "A court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive *educational* benefits?" *Id.* 102 S.Ct. at 3051. (Emphasis added.)

In *Pennhurst State School and Hospital* v. *Halderman, supra,* the U.S. Supreme Court held the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6010 et seq., does not create in favor of the developmentally disabled any substantive rights to appropriate treatment in the least restrictive environment. *Pennhurst* held 42 U.S.C. § 6010 was enacted pursuant to the spending power of Congress and was thus in the nature of a contract in which the State voluntarily and knowingly accepts the term of the contract. *Id.* 101 S.Ct. at 1539.

> There can, of course, be no knowing acceptance if a state is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal monies, it must do so unambiguously.

Id. 101 S.Ct. at 1539.

The Supreme Court in *Rowley, supra*, quoted *Pennhurst* at 102 S.Ct. at 3049, n.26, in construing the EAHCA as being also enacted pursuant to Congress' spending power, and said:

> As already demonstrated, the Act and its history imposes no requirements on the states like those imposed by the District Court and the Court of Appeals. A *fortiori* Congress has not done so unambiguously, as required in the valid exercise of its spending power.

Id. 102 S.Ct. at 3050, n.26.

If the EAHCA does not require an interpreter be provided for a deaf student to benefit from special education and receive a FAPE, as *Rowley* has held, it can hardly be said the EAHCA requires the public schools to provide that *medical treatment* which may be prescribed by the student's physician for *non-educationally related* purposes. If an interpreter for a deaf student is not required, the EAHCA does not require the public schools to "secure the services of persons sufficiently trained to allow a treating physician to prescribe with a view toward prescription implementation by the school." Memorandum Opinion of the District Court (App.p.45), 516 F.Supp. 968, n.13 (1981).

Tatro I was a case of first impression construing EAHCA in this circuit. It necessarily was written solely on the basis of assumed facts and findings. There were no United States Supreme Court cases on which the courts could rely in construing and applying the Delphic statute and its implementing regulations. Appellant believes, therefore, *Tatro I* was written to guide the courts of this circuits in its efforts resolving cases of exceptional importance to handicapped children, their parents, and the public schools. It therefore departed from the Court's usual practice of vacating and remanding for findings of fact cases on appeal from the granting or denial of preliminary injunctions. *Davis* v. *United States*, 422 F.2d 1139 (5th Cir. 1975). In view of events since *Tatro I*, the reasoning behind the general rule is apparent.

Tatro I, since based on only assumed facts, should, Appellant believes, be construed as an advisory opinion "based upon

a hypothetical state of facts." *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 229 at 241 (1937). Such an advisory opinion creates confusion in the lower courts, as well as the panels of this Court, in seeking to determine what precedential effect should be given to its decision.

The panel in the instant appeal was obviously reluctant to follow the general rule that one panel of the court does not overrule another panel. This is more than evident when the Panel wrote at p.4009 of its Opinion:

> Were we writing on a clean slate, we would share the district court's reluctance to read a statute designed to aid education to require provision of medical necessities of life which are required by a child. . .

and

> Although we perhaps would have taken a different view of the EAHCA upon de novo consideration, we cannot say that the well documented *Tatro I* decision was not also a principled interpretation of that undeniably Delphic statute.

It has been held one panel of the 5th Circuit cannot overrule a decision of a previous panel. *Fulford* v. *Klein*, 529 F.2d 377, on rehearing 550 F.2d 342. One panel of the Court of Appeals may not disregard a precedent set by a prior panel, even though it conceives error in the precedent. Only the court en banc can effect such a result. *Davis* v. *Estelle*, 529 F.2d 437.

The Court of Appeals, sitting en banc, may, however, overrule any panel decision that a majority of acting judges believes was wrongfully decided, including a decision established by a panel in an earlier appeal in the same case. *VamGemert* v. *Boeing Co.*, 590 F.2d 433, aff'd 100 S.Ct. 745. Appellant believes, and strongly urges, the issues and questions involved in this appeal are of such exceptional importance in determining the rights of the handicapped child and the obligations of the public schools that this Honorable Court should consider Appellant's Petition for Rehearing and this appeal en banc. Having the benefit of *Pennhurst* and *Rowley*, decided by the

United States Supreme Court since *Tatro I*, compels the Appellant to believe there is more than sufficient reason to believe *Tatro I* is contraty to these decisions of the United States Supreme Court, and that consideration by the full Court is essential to secure and maintain uniformity of decisions in this circuit on matters of such exceptional importance.

CONCLUSION

It seems more than apparent there are substantial differences in judicial opinion between the two panels of this circuit who have considered the complex but important issues involved in this case. The panel in the instant appeal, if it were "writing on a clean slate", would perhaps take "a different view of the EAHCA upon de novo consideration" than the *Tatro I* panel, having the benefit of the subsequent United States Supreme Court's decisions in *Pennhurst* and *Rowley*. It is of exceptional importance that handicapped children and their parents know the extent of their rights under the EAHCA and § 504 of the Rehabilitation Act. It is likewise of exceptional importance to the Irving Independent School District and other public schools of states in this circuit to know the extent of their obligations to their handicapped students, and to therefore avoid inadvertent violation of the rights of a handicapped student.

1. The Appellant therefore requests that a rehearing of the appeal in this cause be granted; and

2. That the honorable judges of this Court order that the above entitled cause be heard by the Court en banc.

Respectfully submitted,

/s/ James W. Deatherage
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Irving Independent School District

CERTIFICATE

As counsel for the Irving Independent School District, Appellant, I hereby certify that the foregoing Suggestion of En Banc Consideration on Rehearing is presented in good faith and not for delay.

/s/ James W. Deatherage
JAMES W. DEATHERAGE
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Suggestion of En Banc Consideration on Rehearing of Appellant, Independent School District, has been delivered by Certified Mail, Return Receipt Requested, to Mr. James C. Todd, Advocacy, Incorporated, 5555 North Lamar, Suite K-109, Austin, Texas, 78751; to Ms. Martha H. Allan, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas, 78711; and to Mr. Tally F. Parker, Jr., 300 InterFirst Bank Building, Irving, Texas, 75061, on this the 9th day of May, 1983.

/s/ James W. Deatherage
JAMES W. DEATHERAGE

TESTIMONY OF DR. GEORGE HURT

* * * *

[261] Q. You don't want her to void, to attempt to void herself?

A. Not yet.

Q. Do you know why 2 or 3 years ago Helping Hand Development School was trying to do that after they had a prescription from you for clean intermittent catheterization?

A. I don't know why they would.

Q. You bring any of your patient records regarding Amber with you today?

A. Just a very few, one page.

Q. May I see that, please?

A. These are copies of what I have of the Scottish Rite records.

Q. You have no office patient records of Amber?

A. No. All I have are letters from lawyers. They asked me to bring anything and all I had was letters from both sides of this. Amber is not a private patient of mine. She goes to Scottish Rite Clinic and I go out there as a consultant and see her. I've gone for a long time. I don't have any residence so I see the patient year after year although it's like a private practice, see them every time that's unless my partner covers for some reason.

* * * *

[263] reach the maximum intervesicle pressure and in that instance crede up into her kidneys. As you creded her you near that pressure or more.

Q. Greater risk to her health to crede the bladder at that interval other than not catheterizating?

A. I think probably be more risk to crede than to leave her alone. Probably gets a higher pressure if you creded a full bladder rather than trying to let it dribble out.

Q. Now, if someone credes the bladder would you necessarily have to crede to the extent to completely empty the bladder or just relieve some of the pressure?

A. Any time you press on a full bladder you're going to increase the pressure, above the pressure you would obtain ordinarily, and so you're going to increase the pressure in the system if you start pressing on the bladder anyway. So I would say that you may be better leaving it alone rather than creding trying to empty, her bladder start leaking, you couldn't empty probably completely with her sphincter.

Q. How much is a greater amount of pressure then say needs to be applied to crede the bladder?

A. Sometimes on a trigger spot and put a little bit of pressure on it but most people in the field of neurogenic bladder work have stopped credeing bladders.

* * * *

[276] A. I understand that.

Q. All right. Do you supervise or control any employee or school nurse of Irving Independent School District?

A. I didn't get the question.

Q. Do you supervise or control any Irving Independent School District employee or nurse?

A. No, I don't.

Q. Have you assigned any of your employees to the Irving Independent School District to carry out any of your prescribed orders?

A. No, I don't think so.

Q. Do you direct any of the school district nurses or teachers' activities and responsibilities?

A. No.

Q. Have you delegated any tasks involving treatment or care of any patient to any nurse or other employee of the Irving Independent School District?

A. Not that I know of.

Q. Does determining abnormality of the individual involve the exercise of some medical judgment?

A. No.

* * * *

TESTIMONY OF CINDY GUY

* * * *

[318] Q. (By Mr. Deatherage) In May of 1979, at the time of the ARD Committee decision, what were the hours of the early childhood classes in the half day program?

A. The class that we felt was most appropriate for Amber at that time was from 8:30 to 11:15, 5 days a week.

THE COURT: 8:30 to 11:15?

* * * *

[320] Q. To your knowledge has Mrs. Tatro or Mr. Tatro requested any educational services for the school year of 1980-'81?

A. Not to my knowledge, no, sir.

* * * *

[321] Q. Thank you. And what was the substance, if you recall, of that conversation with Mrs. Tatro regarding somebody providing CIC?

A. It seems, to the best of my recollection, we discussed that possibility, if there could be some way that Amber could come to school, we would like to have her in, then maybe if Mr. and Mrs. Tatro could go ahead and make arrangements with someone, a neighbor, a friend, a nurse, just whatever, that if in the long run, when all the Court cases and everything ended up, if we did not, the school district did not prevail that we would reimburse them for any expenses that [322] they incurred.

* * * *

RELEVANT PLEADINGS, FINDINGS, CHARGES, OR OPINIONS

The following documents have not been reprinted in the Joint Appendix since they already appear in the Appendix of the Petition for Writ of Certiorari.

Memorandum Opinion of Judge Higginbotham, Tatro I (Filed December 21, 1979) Tatro v. Texas, 481 F.Supp. 1224 (1979) ..... Pet. App. 86a

Opinion of the Court of Appeals (5th Circuit) (J. Goldberg) Tatro I (Filed September 20, 1980) Tatro v. Texas 625 F.2d 557 (1980) ..... Pet. App. 94a

Memorandum Opinion of Judge Higginbotham (Filed May 26, 1981) Tatro v. Texas, 516 F.Supp. 968 (1981) ..... Pet. App. 1a

Judgment ..... Pet. App. 53a

Memorandum Opinion of Judge Higginbotham (Filed September 8, 1981—Unpublished) ..... Pet. App. 55a

Amended Judgment ..... Pet. App. 62a

Opinion of the Court of Appeals (5th Circuit) (J. Gee) (Filed April 25, 1983) Tatro v. Texas 703 F.2d 823 ..... Pet. App. 64a

Order (J. Gee) Denying Petition for Rehearing En Banc (Filed July 5, 1983) ..... Pet. App. 84a

JUDGMENT(S) OR OPINION(S) IN QUESTION

The following documents have not been reprinted in the Joint Appendix since they already appear in the Appendix of the Petition for Writ of Certiorari.

Opinion of the Federal District Court for the Northern District of Texas (Judge Higginbotham) (Filed May 26, 1981) Tatro v. Texas, 516 F.Supp. 968 (1981) ..... Pet. App. 1a

Memorandum Opinion of Judge Higginbotham (Filed September 8, 1981—Unpublished) ..... Pet. App. 55a

Opinion of the Court of Appeals (5th Circuit) (J. Gee) (Filed April 25, 1983) Tatro v. Texas, 703 F.2d 823 ..... Pet. App. 64a